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Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1997

*

ROBIN SMITH,
*Petitioner,*

v.

OREGON STATE BAR,
*Respondent.*

*

Petition For Writ of Certiorari
To the Oregon Supreme Court

*

# PETITION FOR WRIT OF CERTIORARI

Appendix Part 2

*

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67 pp

# PETITION FOR WRIT OF CERTIORARI

Appendix G

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

| | |
|---|---|
| OREGON STATE BAR, a public corporation, Plaintiff-Respondent, | ) Trial Court No. |
| v. | ) C94-0597CV |
| ROBIN S. SMITH, and PEOPLE'S PARALEGAL SERVICE, INC., an Oregon Corporation | ) Appellate Court no. ) CA-A89206 |
| Defendants, Appellants | ) |

Appeal from the Judgment of the Circuit Court
for the COUNTY OF WASHINGTON
Honorable MICHAEL J. MCELLIGOTT, Judge

# APPELLANTS' BRIEF AND ABSTRACT OF RECORD

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Table of Contents

Table of Authorities
Statement of the Case

A. Nature of the Action

B. Nature of the Judgment .

C. Appellate Jurisdiction .

D. Effective Dates

E. Questions Presented on Appeal

1. Whether ORs 9.160 as interpreted by the Supreme Court of Oregon violates Article I, section 8, of the Oregon Constitution

2. Whether the injunction decreed by the trial court is unconstitutionally overbroad and invalid under the Due Process guarantees of the Fourteenth Amendment and First Amendment of the United States Constitution

F. Summary of Arguments

G. Facts of the Case

Assignments of Error

A. THE COURT ERRED IN HOLDING THE PROHIBITIONS OF ORS 9.160 CONSTITUTIONAL

B. THE INJUNCTION IS UNCONSTITUTIONALLY OVERBROAD

Conclusion
Abstract of Record

Judgment and Decree -- Permanent Injunction . .

## Table of Authorities

Federal Cases

Board of Trustees, State University of N.Y. V. Fox.
492 U.S. 469, 482 (1989)

Communist Party V. Control Board.
367 U.S. 1, 81 S.Ct. 1357, 6 L.Ed.2d 625 (1961) . .

State Cases

City of Hilisboro V. Purcell.
306 Or. 547, 761 P.2d 510 (1988)
City of Portland V. Tidyman.
306 Or. 174, 759 P.2d 242 (1988) . .

Cooper V. Eugene School District.
301 Or. 358, 723 P.2d 298 (1986)

In Re Conduct of Lasswell.
296 Or. 121, 673 P.2d 855 (1983)

In Re Schenck.
318 Or. 402, 870 P.2d 185 (1994)

Moser V. Frohnmayer.
315 Or. 372, 845 P.2d 1284 (1993)

Oregon State Bar V. Gilchrist.
538 P.2d 913 (1975) .

Oregon State Bar V. John H. Miller & Co
385 P.2d 181 (1963)

Oregon State Bar V. Security Escrows, Inc..
377 P.2d 334 (1962)

Oregon State Bar V. Wright.
280 Or. 693, 573 P.2d 283 (1977)

Oregon State Police Ass'n. V. State.
308 Or. 531, 783 P.2d 7 (1989) .

State V. Blair.
287 Or. 519, 601 P.2d 766 (1979) . . .

State v. Garcias,
296 Or. 688, 679 P.2d 1354 (1984)

State v. Henry
302 Or. 510, 732 P.2d 9 (1987).

State v. Moyle,
299 Or. 691, 705 P.2d 740 (1985)

State v. Plowman,
314 Or. 157, 838 P.2d 558 (1992)

State v. Ray,
302 Or. 595, 733 P.2d 28 (1977)

State v. Robertson,
293 Or. 453, 649 P.2d 569 (1982)

State v. Spencer
289 Or. 225, 611 P.2d 1147 (1980)

Wheeler v. Green,

286 Or. 99, 593 P.2d 777, 788 (1979)

Constitutional and Statutory Provisions
United States Constitution, First Amendment
United States Constitution, Fourteenth Amendment
Oregon Constitution Article I, section 8

ORS 9.160
ORS 19.023
ORS 19.026
ORS 19.029
ORS 34.340
ORS 48.415
ORS 51.240
ORS 52.060
ORS 656.283
ORS 656.291

ORS 696.030

ORS 697.021

Secondary Authorities

The American Bar Association Commission on Nonlawyer Practice, Nonlawyer Activity in Law-Related Situations. (1995) .

## Statement of the Case

### A. Nature of the Action

The Oregon State Bar filed a complaint for injunctive relief against Robin S. Smith and People's paralegal Services, Inc., alleging defendants engaged in the unlawful practice of law in violation of ORS 9.160, seeking a permanent injunction against providing any legal advice.

### B.Nature of the Judgment

After trial before the court, the court permanently enjoined defendants against providing any legal advice

C. Appellate Jurisdiction This court has jurisdiction pursuant to ORS 19.023,19.026, 19.029, 19.023.

### D. Effective Dates

The injunction was entered on June 14, 1995, and the notice of appeal was served and filed on July 10, 1995.

### E. Questions presented on Appeal

1. Whether ORS 9.160 as interpreted by the Supreme Court of Oregon violates Article I, section 8 (Art. I, sec. 8), of the Oregon State Constitution.

2. Whether the injunction decreed by the trial court is unconstitutionally overbroad and invalid under the Due Process guarantees of the Fourteenth Amendment and First Amendment of the United States Constitution.

F. Summary of Arguments

1. ORS 9.160, the unauthorized practice of law statute, as interpreted, proscribes the out of court exchange of legal advice between nonlawyer citizens of Oregon Historically, there was no prohibition on the exchange of legal advice and assistance between citizens Personalized, out of court legal advice was freely exchanged by nonlawyer citizens in all states and in the Oregon Territory up to and well beyond the adoption of the Constitution of Oregon in 1859. In that ORS 9.160 has been consistently interpreted by the Supreme Court of Oregon to ban out of court legal advice by nonlawyers, the statute is both facially and as applied herein an unconstitutional ban on the content of speech in violation of Art. I, sec. 8 of the Oregon Constitution.

2. The trial court's injunction bans Ms. Smith from engaging in any form of legal advice and practice. In doing so, it sweeps within its proscription the many forms of law practice that the state or federal government permit to any nonlawyer. Both expressly and by necessary implication the state legislature has authorized numerous forms of nonlawyer practice, including practice before certain courts and many administrative agencies. Because nonlawyer representation before these bodies is permitted, the substantive, procedural, and evidentiary legal advice necessary to such representation is also permitted. In addition to state authorization, the United States has authorized many forms of federal law

practice by nonlawyer Oregon citizens. The trial court injunction is unconstitutionally overbroad in banning government authorized forms of law practice. Because even the legal profession itself has great difficulty in determining which forms of nonlawyer law practice are authorized and which are not, the trial court's injunction cannot be cured of its overbreadth without becoming void for vagueness.

## G. Facts of the Case

Citizens in Oregon and in the rest of the United States and its territories were historically free to give and receive legal advice without interference or restriction by the government. Local and federal government may have, in varying degree, regulated who could act in a representative capacity in various courts and who could hold oneself out as an attorney qualified to practice before the courts. However, from the founding of the nation to the adoption of the Oregon Constitution, there existed no government restriction on out of court legal speech between citizens. Nonlawyer citizens freely advised and assisted one another on legal matters. State restrictions on out of court speech whether legislative or judicial, were adopted only in the twentieth century.

Robin S. Smith and her company, People's Paralegal Services, Inc., defendants below and appellants herein, from July 1, 1987 until enjoined herein assisted some 9,000 citizens on pro per legal matters. Findings of Fact, No. 9 (A.1). Neither Ms. Smith nor her company's employees held

themselves out as attorneys. They advised those they assisted they were not attorneys. Findings of Fact, Nos. 7, 8 (A.1). Many citizens of Oregon have serious need for the types of legal services provided by Ms. Smith but cannot obtain such services from attorneys licensed by the Oregon State Bar. Finding of Fact, No. 172 (A.1).

## I. Assignments of Error

### A. THE COURT ERRED IN HOLDING THE PROHIBITIONS OF ORS 9.160 CONSTITUTIONAL

ORS 9.160, the unauthorized practice of law statute, is an absolute ban on the free exchange of legal advice between nonlawyers in Oregon. Art. I, sec. 8, of the Oregon State Constitution prohibits the government, with few historical exceptions, from "... restricting the right to speak, write, or print freely on any subject whatever . . . . ORS 9.160, is a governmental enactment that, on its face, absolutely prohibits the free exchange of certain subject matter speech. The speech prohibited by the statute was not proscribed historically, and is therefore unconstitutional under any coherent reading of Art. I, sec. 8.

The Oregon Supreme Court has spoken clearly in State v. Spencer, 289 Or. 225, 611 P.2d 1147, 1148 (1980), State v.

Article I, section 8 of the Oregon Constitution provides:

> No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.

Robertson, 293 Or. 453, 649 P.2d 569, 576 (1982), and their progeny, that the words of Art. I, sec. 8, mean what they say, and that "[i]f a law concerning free speech on its face violates this prohibition, it is unconstitutional Spencer, 611 P.2d at 1148. This well settled approach mandates two lines of inquiry which conclusively determine the governmental enactment at hand, ORS 9.160, is facially unconstitutional.

The first line of inquiry tests whether the unauthorized practice of law statute absolutely banning the free exchange of legal advice between nonlawyers is a governmental enactment that on its face restrains the "free expression of opinion" or restricts the "right to speak" on any subject whatever. Robertson, 293 Or. at 412, 649 P.2d at 576 (quoting State v. Spencer, 611 P.2d at 1148); see also, State v. Moyle, 299 Or. 691, 695, 705 P.2d 740, 743-44 (1985). A governmental enactment restricts freedom of expression and the right to speak when it is directed at the act or subject of any communication rather than some defined injury. Spencer, 611 P.2d at 1148; State v. Plowman, 314 Or. 157, 164, 838 P.2d 558, 562 (1992). Governmental enactments within this category violate Art. I, sec. 8, unless the second line of inquiry indicates the restraint can be wholly confined within one of the few well established historic exceptions. State v. Blair, 287 Or. 519, 601 P.2d 766, 768 (1979) (statute that in its own terms forbids speech is vulnerable to constitutional attack on

its face).

For example, the Spencer Court voided the former Oregon disorderly conduct statute which prohibited the expression of "abusive or obscene language ... in a public place; ..." if accompanied with "intent to cause public inconvenience, annoyance or alarm " (former) ORS 166.025 (1)(c). The Spencer Court observed the statute made the "speaking of the words themselves criminal, if spoken with the requisite intent, even if no harm was caused or threatened." Spencer 611 P.2d at 1148. Thus, it concluded "when the terms of a statute as written prohibit or restrain expression" that does not come within the historical exception of Art. I, Sec. 8, it is unconstitutional. Spencer, 611 P.2d at 1149. See also, Moser v Frohnmayer, 315 Or. 372, 376, 845 P.2d 1284, 1286 (1993) (statute prohibiting use of automatic dialing and announcing device to solicit purchase of realty, goods or services, not valid on basis it proscribed speech and not harmful effects of automated telephone solicitation); State v. Henry, 302 Or. 510, 515, 732 P.2d 9, 11 (1987) (law against disseminating obscene material invalid on basis it was written in terms proscribing content of historically privileged speech not effect); City of Portland v Tidyman, 306 Or. 174, 184, 759 P.2d 242, 247 (1988) (land use statute invalid because it distinguished businesses on basis of content of "adult" materials sold not actual effect of trade); State v. Blair, 287 Or. 519, 601 P.2d 766 (1979) (harassment statute

forbidding some types of telephone calls constitutionally inadequate because it did not require an "effect" on the listener). The clear rule is that statutes which restrain speech but do not make an actual, concrete, completed harm the focus of its prohibition have been uniformly struck down unless the governmental enactment can be wholly confined within some historical exception.

Unquestionably, ORS 9.160, as interpreted by the Oregon Supreme Court, proscribes expression about any subject or the act of communication. The statute reads:

> Except for the right reserved to litigants by ORS 9.320 to prosecute or defend a cause in person, no person shall practice law or represent that person as qualified to practice law unless that person is an active member of the Oregon State Bar.

ORS 9.160

The Oregon Supreme Court has defined the practice of law as:

> ... [Any exercise of an intelligent choice, or an informed discretion in advising another of his legal rights and duties, ...

Oregon State Bar v. Security Escrows, Inc., 377 P.2d 334, 339 (1962); see also, Oregon State Bar v. John H. Miller & Co., 385 P.2d 181, 182 (1963); Oregon State Bar v. Gilchrist, 538 P.2d 913, 919 (1975); Oregon State Bar v. Wright, 280 Or. 693, 573 P.2d 283, 286 (1977).

Read together, this governmental enactment absolutely prohibits the free exchange of legal advice between nonlawyers in Oregon The statute does not require the communication to cause any adverse consequence or effect on the listener. All it requires is that a nonmember of the bar communicate on the

subject prohibited. Unless it can be wholly confined within some well excepted historic exception, ORS 9.160 violates Art. I, sec. 8.

The second line of inquiry tests whether the party defending the unauthorized practice of law statute, enacted during the Great Depression era, can prove it may be wholly confined within some well established governmental prohibition in existence when the early American guarantees of freedom of speech were adopted, and that these early American guarantees of freedom did not intend to liberate it. Robertson, 649 P.2d at 576. Examples of well established conventional crimes the early guarantees of freedom of expression were not intended to abolish are fraud, perjury, extortion, solicitation, and the attempting, carrying out, or concealing of crimes. Id.; see also, State v. Henry, 302 Or at 515, 732 P.2d at 11. Where, as here, the party defending the governmental enactment cannot satisfy the heavy burden of proving an historical exception, the governmental enactment, on its face, violates Art. I, sec. 8.

For example, the Henry Court had to determine if "obscene" speech should be made an historical exception to the absolute terms of Art. I, sec. 8. It concluded that "restrictions on sexually explicit and obscene expression between adults were not well established at the time of the adoption of Article I, section 8." State v. Henry, 302 Or. at 523, 732 P.2d at 16. But the Henry Court reached this

conclusion despite the fact that the Oregon Codes of 1853 and 1855 both contained a similar provision criminally proscribing the dissemination of obscene writings or pictures. To this end the Henry Court reasoned the territorial statutes were in "no way the equivalent of statutes punishing libel, perjury, forgery and the like." State v. Henry, 302 Or. at 522, 732 P.2d at 16. Thus, the Henry Court concluded "obscenity" was expression that could not be restricted because it did not wholly fall within any historical exception. A similar result follows for ORS 9.160.

Beyond any doubt, ORS 9.160 cannot be wholly confined within some historical exception that was well established when the early American guarantees of freedom of expression were adopted, i.e., by the late eighteenth and mid-nineteenth centuries. Conclusively, the Oregon unauthorized practice of law statute was not enacted until the Great Depression era when similar statutes flourished across the country and state bar associations began to vigorously enforce these statutes against nonlawyers.

Neither is ORS 9.160 a modern version of some historical exception. ORS 9.160 is plainly an absolute ban on a type of speech that no antecedent governmental enactment had ever concerned itself with: The out of court exchange of legal advice between nonlawyers. The American Bar Association Commission on Nonlawyer Practice in Nonlawyer Activity in Law-Related Situations, has detailed these historical

circumstances. It reports:

> Despite the number of distinguished lawyers who appeared on the scene in the years after the revolution, the first 100 years of the new American nation were marked by an unregulated legal profession. During this period virtually all colonial era restrictions on admission to practice were removed. ... In the 19 new states admitted to the union between independence and 1860, the earliest colonial era model of an untrained and unregulated bar -- even for appearances in court --was replicated.

The report continues:

> In the mid-nineteenth century, the era of expansion to the unsettled west began and marked the rise of "Jacksonian democracy" that scorned class privilege and encouraged ordinary people to assume all the responsibilities, including representation in legal matters, that they thought appropriate. This further encouraged the practice of law by all persons without regard to educational or other qualifications. (citations omitted).

The American Bar Association Commission on Nonlawyer Practice, Nonlawyer Activity in Law-Related Situations, (1995), pgs. 19-20.

Consistent with this historical version, the Oregon Supreme Court in State v. Henry, concluded in the context of determining whether obscenity had been well established as a conventional crime that:

> [W]e perceive that most members of the Constitutional convention of 1857 were rugged and robust individuals dedicated to founding a free society unfettered by the governmental imposition of some people's views of morality on the free expression of others.

State v. Henry, 302 Or. at 523, 732 P.2d at 16.

Absent any well established historical basis for an absolute ban on the free exchange of legal advice between nonlawyers, the party defending ORS 9.160 is unable to except

it from the broad sweep of Art. I, sec. 8. The unauthorized practice of law statute is plainly a twentieth century governmental enactment without any historical precedent aimed at banning communication between nonlawyers on a certain subject, and therefore it violates Oregon's constitutional guarantee of free expression. But more than a syllogistic exercise, this analysis reveals the vital principles central to a coherent understanding of Art. I, sec. 8.

In Oregon, because communication on any subject is constitutionally privileged unless there is an historical exception, speech can only be regulated incidentally by laws which proscribe some real and objectively harmful effect likely to follow from certain words at the time and place they are uttered. City of Portland v. Tidyman, 306 Or. at 188, 759 P.2d at 249. The role of this requirement is to prevent the enactment of governmental restraints on speech based on generalized presumptions and apprehensions that may not be later challenged. City of Portland v. Tidyman. 306 Or. at 189, 759 P.2d at 250 (referring to Communist Party v Control Board, 367 U.S. 1, 81 S.Ct. 1357, 6 L.Ed.2d 625 (1961) where the extensive legislative findings of a statute about a "world Communist movement" could not be challenged). ORS 9.160 is plainly a governmental restraint on speech that does not specify the harmful effect objectively likely to follow from the exchange of legal advice between nonlawyers, and to the extent the court reads into the statute a harmful effect it is

designed to prevent, the prohibition still fails to satisfy the well settled constitutional requirements in Oregon for permissible restraints on the secondary effects of speech.

There are only two categories of permissible governmental enactments that incidentally may restrain speech under Art. I, sec. 8, other than those which are historically excepted, in Oregon. The first category contains those governmental enactments addressing some completed abuse of expression. See generally, Robertson, 649 P.2d at 579 (coercing another into undesired conduct a prescribable secondary effect, statute voided for overbreadth); State v. Moyle, 705 P.2d at 745 (alarming another person by threats); State v. Ray, 302 Or. 595, 599, 733 P.2d 28, 30 (1987) (words causing psychic injury had prescribable secondary effect, statute voided for overbreadth); State v. Garcias, 296 Or. 688, 679 P.2d 1354, 1358 (1984) ("...state may forbid actually placing another in fear of imminent serious physical injury... "). The idea is that the secondary effects of certain words may be proscribed, even though the words alone cannot be banned. Clearly, ORS 9.160 does not fit within this category because it is an absolute ban on the exchange of legal advice between nonlawyers, whether it causes harmful effects or not.

Neither can the absolute ban of ORS 9.160 be saved by recasting it as a necessary prior restraint to avoid some future harmful effect of speech. In Oregon, the only permissible prior restraints are those that have been narrowly

interpreted to limit the speech of a public official where it is objectively and highly likely his speech is actually incompatible with his official function.

Thus, this second category contains those governmental enactments restraining the free expression of public officials, not where an abuse has already occurred causing a harmful effect, but where an abuse is serious and imminent enough such that the public official's speech is actually incompatible with his required function and the enactment does not absolutely ban his privileged expression. See generally, In Re Conduct of Lasswell, 296 Or. 121, 673 P.2d 855, 857 (1983) (disciplinary rule prohibiting certain communications by prosecutor upheld where in a specific case his extra judicial comments relating to the case were highly likely to be actually incompatible with his official function to preserve the conditions of a constitutionally required fair trial); Cooper v. Eugene School District, 301 Or. 358, 377-78, 723 P.2d 298, 311 (1986) (statute upheld prohibiting teacher, only when in contact with students, from wearing clothes that communicated adherence to a particular religion, on the basis it was highly likely the secondary effect of her expression was actually incompatible with her official function to facilitate the constitutional guarantee of nonsectarian state education); In Re Schenck 318 Or. 402, 431, 870 P.2d 185, 203 (1994) (judicial canons upheld that were basis for disciplining judge for publishing a letter and editorial whose

secondary effect was highly likely to be actually incompatible with his official function of impartiality on a specific case); cf, Oregon State Police Ass'n. v. State, 308 Or. 531, 536, 783 P.2d 7, 9 (1989) (absolute ban on any political activity or speech except voting of police officers not upheld). ORS 9.160 in no way fits within this second category.

The unauthorized practice of law statute does not fall within the second category because it is an absolute ban on every private nonlawyer citizen of Oregon from freely exchanging information on the subject of legal advice. Private nonlawyer citizens of Oregon simply have no official function with which their speech is actually incompatible. Public officials though. may typicallv have duties of constitutional significance with which their exercise of free speech may be objectively incompatible. No such dilemma exists for private nonlawyer citizens.

To summarize, ORS 9.160 is a governmental enactment absolutely banning the free exchange of legal advice between nonlawyers that does not specify any harmful secondary effect of the entire subject it prohibits. Further, the unauthorized practice of law statute cannot be justified as a necessary prior restraint where the Oregon Supreme Court has narrowly limited this category to the partial restraint on speech of public officials that is objectively and highly likely to be actually incompatible with their official duties of

constitutional significance.

ORS 9.160 reflects nothing more, without historical antecedent, than a generalized governmental apprehension of the free exchange of legal advice between nonlawyers. The very fact that the government may deem it desirable makes it just the type of governmental enactment Art. I, sec. 8, was drafted to prevent. As the Oregon Supreme Court said in City of Hillsboro v. Purcell:

> With regard to prohibitions on speech or writing before some completed abuse of these rights, we have held that government, with few historical exceptions, cannot prohibit speech outright by making it a crime.

City of Hillsboro v. Purcell, 306 Or. 547, 553, 761 P.2d 510, 513 (1988).

The Robertson Court stated this core principle in the following way:

> [Article I, section 8, prohibits lawmakers from enacting restrictions that focus on the content of speech or writing, either because that content itself is deemed socially undesirable or offensive, or because it is thought to have adverse consequences. ... [L]aws must focus on proscribing the pursuit or accomplishment of forbidden results rather than on the suppression of speech or writing either as an end in itself or as a means to some other legislative end.

Robertson, 649 P.2d at 579.

To conclude otherwise, that ORS 9.160 is constitutional, would be to permit the government to define the harmful secondary effects of words, as the words themselves. This would turn Art. I, sec. 8, inside out. This isn't to say however, that the government is foreclosed from providing a

compensatory rather than prohibitory remedy for injuries to "person, property, or reputation," by "abuse of rights under Art. I, sec. 8. State v. Ray 302 Or. at 602, 733 P.2d at 28

(J. Linde, concurring); see also, Wheeler v. Green, 286 Or. 99, 593 P.2d 777, 788 (1979) ("be responsible for abuse of this right" refers to civil remedies for injuries to another).

In conclusion, the Oregon Supreme Court has repeatedly and soundly rejected reasoning which would permit the unauthorized practice of law statute to survive a challenge under Art I, sec. 8 of the Oregon State Constitution.

## B. THE INJUNCTION IS UNCONSTITUTIONALLY OVERBROAD

The Oregon legislature has limited certain forms of legal advice and law practice to licensed attorneys. However, as shown below, it has authorized nonlawyers to engage in myriad other forms of law practice. As shown above, to the extent that the state has attempted to apply its proscriptions to out of court legal advice, it has unconstitutionally proscribed historically protected speech. However, even if, arguendo, the Oregon Constitution permitted such proscription, the injunction would still be invalid in that its reach is unconstitutionally overbroad. The trial court's injunction banned Ms. Smith from all law practice including all forms of federal and state sanctioned nonlawyer law practice. In doing so, the trial court's injunction order violates Ms. Smith's rights to free speech and association guaranteed by the First

and Fourteenth Amendments to the United States Constitution,[2] as well as by the Oregon Constitution.

In some cases, the Oregon legislature has expressly authorized nonlawyers to engage in legal practice; in others it has done so by necessary implication. The legislature's implicit authorization extends to the numerous state agencies that hold administrative hearings in which nonlawyers are permitted by regulation to practice law. The legislature's implicit authorization further extends to nonlawyer practice within such agencies, e.g. personnel specialists advising on personnel rights and obligations, Equal Employment Opportunity specialists advising on complaints of racial or sexual discrimination, etc. Further, the legislature has implicitly authorized the practice of law in those unlicensed professions and vocations in which the sharing of advice having legal consequences is an inevitable daily practice, e.g., bankers, tax advisors, personnel professionals, car dealers, etc.

2 The relevant text of these amendments is:

> Amendment I: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> Amendment XIV, Section 1: ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The instances of express legislative authorization of nonlawyer law practice are numerous. Oregon citizens may assist one another in advising and preparing writs of habeas corpus (one of the most complex areas of the law). ORS

34.340 Nonlawyers may represent persons in justice of peace courts in both criminal and civil legal matters. ORS 52.060. Nonlawyers may practice law by serving as justices of the peace. ORS 51.240. The Oregon legislature has authorized municipalities to permit nonlawyer representation in municipal courts. Subject to consent of the court, nonlawyers have been authorized by the Oregon legislature to represent parties in small claims court. ORS 48.415(4). Nonlawyers may represent parties before a district judge when functioning as a justice of the peace. ORS 52.060. Nonlawyers can represent others in certain aspects of workmen's compensation proceedings. ORS 656. 283(10)(6)(A); ORS 656.291(5)(6). Nonlawyers may practice law under certain circumstances in the rental and management of real estate. ORS 696.030(c), (g), (k), ff. The legislature has authorized nonlawyers to practice law in collecting claims for others. ORS 697.021(6)(2). The practice of law is authorized before the Children's Service Division, the Vocational Rehabilitation Division, the Employment Department, the Adult and Family Services Division, the Insurance Division, the OSHA Division, the Construction Contract Board, and other agencies. Where representation is authorized, the free exchange of legal advice between

nonlawyers on myriad legal, procedural, and evidentiary issues relating to such authorized practice is by necessary implication also authorized.

In addition to the above noninclusive examples of law practice authorized by the state, the United States has authorized nonlawyer citizens of Oregon to freely advise and represent one another in many areas of federal law, e.g., federal administrative agency practice, bankruptcy practice, federal personnel actions, federal employee union grievances, etc.

In Short, while certain areas of law practice are proscribed, large areas of nonlawyer law practice are state and federally sanctioned. Yet the trial court's injunction prospectively bans Ms. Smith and her company from all forms of law practice, whether authorized or not. State and federally sanctioned legal advice is educational speech and cannot be banned absent a compelling state interest and means narrowly tailored to further the state's interest while protecting the speakers right to speak freely. Board of Trustees, State University of N.Y. v. Fox, 492 U.S. 469, 482 (1989). That the state has no compelling interest in banning speech which its legislature has expressly authorized its citizens to engage in without regard to qualifications is beyond argument. An injunction that sweeps within its ban not only speech the state has proscribed but speech the state and the federal government affirmatively sanction is an unconstitutionally

overbroad injunction. Nor can the injunction's overbreadth be cured with a narrowing interpretation.

There is an enormous amount of legal advice being spoken everyday in numerous unlicensed professions and vocations. A car dealer advises a potential customer as to warranty or rescission rights. A personnel specialist advises an employee as to federally mandated equal employment requirements; a father advises a son calling from the police station of his right to remain silent. The State of Oregon, in curing any potential vagueness in the meaning of the term "practice of law," by defining it as any legal advice on any matter, has created a vagueness problem as to which forms of legal advice are authorized and which forms are unauthorized. Given the inability of anyone to know which advice in Oregon 15 proscribed and which is authorized, the trial court's injunction is unconstitutionally overbroad as it reads and is not subject to a clear narrowing which would cure its overbreadth.

## Conclusion

For the reasons set forth, Defendant/Appellant respectfully request that the conclusions of law below be reversed and the injunction vacated.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE OF TRUE COPY

I hereby certify that I caused to be served two copies of the foregoing APPELLANTS' BRIEF on the following attorney on 12 March 1996 by mailing to attorney's office a true copy thereof and contained in a sealed envelope, with correct postage, addressed to said attorney at his last known address as shown below.

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Attorney for Plaintiffs

# PETITION FOR WRIT OF CERTIORARI

## Appendix H

I didn't go back -- I think that case is from '62. In any event, the case is there. Somebody, at some point in time, has got to define this. If they don't do this, if it's not the legislature, if it's not the judicial arm, then people like my client are going to continue to not know, what are the guidelines? Where do you step over the line?

And, significantly, what's happening and hat's happened in this case, based on the evidence, is that there has been a fundamental violation of at least the commercial right to speech under both constitutions. And I think that the statute, on its face, the statute that the Bar is enforcing or seeking to enforce pursuant to its grant of that power through the legislature, is facially defective. It's unconstitutional. It's consistent with -- Maybe I'm dovetailing these two arguments, because they go together. It's the due process argument, as I said, under both the federal and state constitutions.

When you take a look at those, we're dealing with fundamental rights, we're dealing with the right to speech, we're dealing with the right to earn property, under respective portions of the

amendment. And this statute is so broad, with no ]ldefinition, it's so broad, it provides no guidance.

I would ask the Court to take judicial notice of the current definition of the Unlawful practice of Law Committee rules, as promulgated by the plaintiff, the Oregon State Bar.

MR. REEL: Your Honor, I would object to him Referring to something that is not yet in evidence. le's arguing affirmative defenses, as I understand it, so I would object to him referring --THE COURT: I think he's got a point. I think you can refer to it in your argument, but I can't take judicial notice of it, unless we get past our motions.

MR. ABBOTT: All right, Your Honor. The point I will argue, and then if I don't survive the motions, I will put into evidence, is that the Bar hasn't defined it; or if they did, the plaintiff hasn't proved it. We know the legislature hasn't defined it and we know, in fact, the Court hasn't defined it, the "it" being "What is the practice of law?"

The problem with that is it's obvious, from what people have -- from what testimony you've heard to date, is that there are, in fact, kits out there

that people can buy. From the evidence you've heard to date, we know there is at least one lawyer in the state of Oregon who has a side business selling kits, selling it to customers -- I assume she would use a word like that, referring to Miss Elliott -- but in any event, selling that kind of do-it-yourself information to third parties.

The problem is: What is the practice of law? And I think the statute is overly broad, and it fails because it encompasses and sweeps in First Amendment rights. And for both those reasons, we would move the Court for a directed verdict.

THE COURT: Mr. Reel?

MR. REEL: Your Honor, our trial memo, I think, addresses this very well. And I don't want to repeat the whole thing, but the Court, the Supreme Court, has clearly stated what the unauthorized practice of law is; and it says you can't have personal contact with a customer if it's in the nature of consulting, explaining, recommending, or advising. You can't have contact and discussion with customers if it's in the nature of assistance in selecting particular forms. You can't have personal contact and discussion with customers if it's in the nature of filling out any part of the forms or

suggesting or advising how the forms should be used in solving the particular customer's -- in that case, marital problems.

And they said that to do so is the unlawful practice of law and must be strictly enjoined. That's the Gilchrist case. It's been followed -- It was announced in 1975, and it's been followed for 20 years.

The most recent appellate decision, I believe, was State ex rel Frohnmeyer v Consumer Sounding Board, which held that when a person gives procedural and substantive advice on legal issues or advises them how to fill out forms, they have engaged in the practice of law.

THE COURT: The point that Counsel was making, I think, that -- actually, his second point, a point he should have made, I'll put it. Even if the Supreme Court has written all this wonderful, clear language, how does that help us when we're dealing with the statute?

MR. REEL: Because the law is that Courts may look to custom, practice, and appellate court decisions in defining the terms of statutes. And, particularly, there is a direct holding in the state of Washington that their statute, which is virtually

the same as ours, does not define unlawful practice of law, is constitutional, and was upheld in the Hunt case, I believe it was. I can find it in my memo. And they said, "We can specifically refer to court decisions." Their Supreme Court had defined it.

In addition to that, we have the Oregon Supreme Court, in one of the Wright decisions that I cited, directly saying that the practice of law, the statute is not unconstitutionally vague as applied to the facts of the Wright case. And we have the Ninth Circuit upholding a U.S. District Court of Oregon decision that this statute, 9.160, is not unconstitutionally vague. So if this Court were to make a different ruling, it would not be following those higher court decisions. I don't know what else can be said.

MR. ABBOTT: Can I just respond real briefly, Your Honor?

THE COURT: You can.

MR. ABBOTT: Obviously, the Court has read the trial memos, and I'm not going to reincorporate that. The only comment I want to make is to underscore -- hopefully we made the point in our memoranda -- that in the Wright decision, he admitted, the party being sued, that he was engaged

in the unauthorized practice of law, and he said that the statute was unconstitutional. That's fundamentally different than the scenario in this case.

Thank you.

THE COURT: The difficulty that you get into in certain situations, whether you're the legislature or whether you're the Supreme Court or you're the Ninth Circuit or you're the Court of Appeals or you're a Circuit Court judge, is there are those things -- and the one that we all hear about is pornography -- that you know it when you see it, but you can't put it in words. And brighter people than I have had that particular problem. The practice of law, like pornography, has that same kind of problem, especially when you get out towards the periphery.

Our Oregon Supreme Court has, in fact, made it clear that the practice of law in the state of Oregon, that that phrase includes -- and, again, this is just quoting from the Gilchrist case -- includes "all personal contact . . . in the nature of consultation, explanation, recommendation or advice or other assistance in selecting particular forms, in filling out any part of the forms, or suggesting or

advising how the forms should be used in solving the particular customer's marital problems does constitute the practice of law and must be and is strictly enjoined."

And, clearly, some of the testimony in this case has come within that interpreted proscription. And, hence, while on the periphery you may have a vagueness sort of problem and there are aspects of the testimony in this case that are well within any part of the phrase that may be vague, I'm going to deny the motion.

# PETITION FOR WRIT OF CERTIORARI

## Appendix I

# NON LAWYER ACTIVITY IN LAW RELATED SITUATIONS

REPORT WITH RECOMMENDATIONS

AMERICAN BAR ASSOCIATION
COMMISSION ON NON LAWYER PRACTICE

August 1995

## Executive Summary

The Commission's report, *NonLawyer Activity in Law-Related Situations*, is based on the statements of nearly 400 witnesses and the information contained in more than 2,000 documents gathered during the course of the Commission's deliberations and ten hearings held in 1992,1993 and 1994 Part One of the Report details the findings of the Commission. Part Two sets forth the Commission's analysis, conclusions and recommendations.

## PART ONE; FINDINGS

### A. The History of Nonlawyor Delivery of Legal and Law-Related Services

From the founding of the colonies until today, nonlawyers have participated with lawyers in the giving of advice and assistance to others on matters involving the law The role of nonlawyers in the process waxed and waned until the eve of the 20th century. Then, in a span of about 70 years, requirements for admission to practice law became more rigorous and laws prohibiting the unauthorized practice of law (UPL) were enacted. The 1930s began several decades of aggressive enforcement of UPL laws. The last 20 years have seen a gradual decline of enforcement, although increased activity by prosecutors or state bar UPL committees has occurred in several jurisdictions in the last few years.

### B. Nonlawyer Activilies in specific Legal and Law-Related Maffers

Today, individuals often choose to act on their own behalf without the assistance of a lawyer in situations that involve the law, even when those situations involve appearances before courts or administrative tribunals. Self-representation is particularly common in day-to-day business and personal interactions, in family courts, in tribunals hearing traffic, housing, estate and small claims matters, and in many state and federal administrative proceedings. Among reasons for self-representation given by those appearing before the Commission were the expected cost of hiring a lawyer, the perceived simplicity of a matter, the desire to act independence, and frequency, problems of communication with lawyers.

People who choose to represent themselves obtain needed information from many sources other than lawyers, ranging from neighbors, friends and the media, to religious advisors, teachers, co-workers, counselors and computer networks. A significant development is the proliferation of self-help books and computer software programs related to a vast range of law-related situations, many of which provide ready-to-use legal forms accompanied by instructions

on their preparation and use. This new frontier of self-help materials draws on increasingly available and accepted technology: software programs guide individuals in the preparation of legal forms; e-mail networks make quick exchanges of information easier; and a few courts even make computer-generated forms available within the courthouse.

Some self-representing individuals are not skilled in the use of computers, or even typewriters; others do not speak or read English. For such persons, document preparers copy handwritten documents, type dictated information into forms, or translate responses from a person's native language into English. As long as document preparers give no legal advice (even advice as to which form to use) their services are almost always held not to violate statutes prohibiting the unauthorized practice of law

The Commission found that an extensive array of federal and state administrative agencies allow nonlawyers to provide advice to self-representing persons and even to represent parties in agency proceedings. Examples of federal agencies that allow nonlawyer practice include the Internal Revenue Service, the Immigration and Naturalization Service, the Social Security Administration and the Patent Office. In those agencies, nonlawyers not only assist with agency paperwork and applications for agency action, but also may handle full evidentiary hearings as well. The Supreme Court of the United States has held that a federal agency's decision to allow nonlawyer practice preempts application of state UPL provisions.

Myriad instances of legal advice and representation by owners and employees of well-established businesses, as well as by employees of unions and government, are often overlooked in a review of nonlawyer activity in law-related situations. Among the businesses are tide companies, real estate brokerages, accounting firms, bank trust departments, debt collection agencies and architects. Union representatives represent workers in the automobile industry; teaching profession and a host of other labor settings in grievance hearings, arbitrations and negotiations. Government employees provide advice about the law to members of the public.

Members of community-based organizations and nonprofit charitable groups also provide advice and, sometimes, representation to group members and to low- and moderate-income individuals concerning their law-related problems. In certain instances, such as asylum assistance or advocacy on behalf of children with special educational needs, these nonlawyer advocates undertake lengthy training, use sophisticated materials and offer extremely specialized services.

Finally, the Commission found that an increasing number of other non-lawyers are offering advice and assistance to self-representing individuals or are actually representing consumers in law-related situations. The Report categorizes these nonlawyers as "legal technicians." The number of legal technicians is not known. One relatively well known example is the storefront

tax preparer. Other examples include persons offering services to individuals seeking divorces, facing evictions, applying for visas, claiming bankruptcy, and desiring wills and trusts, and persons calling themselves document preparers but offering advice about legal forms. The Commission's record contains reports of both high and low quality work by legal technicians (including some work by people described as document preparers but who were also providing advice) and some reports of actual harm to consumers.

C. The Growth of the Paralegal Profession

Paralegals, as defined in the Report, are different from legal technicians by virtue of their working with the supervision of lawyers, or at least with lawyers who are accountable for their work. The paralegal profession has grown greatly since it came into existence during the 1960s. Paralegals work in law firms, government agencies, corporate law departments, nonprofit organizations and, increasingly, on their own as freelance or contract paralegals. They often perform complex substantive tasks which would otherwise be done by lawyers. Although a lawyer is always accountable to a client for a paralegal's work, witnesses reported that many paralegals operate without meaningful supervision. An increasing number of paralegals have higher educations, and two national paralegal organizations are urging broad adoption of voluntary certification systems for paralegals. The details of their recommendations, and those of other paralegal organizations, can be found in an Appendix to the Report.

D. Nonlawyer Activity to Consumers

Authority on the specific liability to consumers of different types of nonlawyer providers of law-related services varies. For example, union representatives are not held to a lawyer's standard of care when representing union members at hearings while some legal technicians have been held to lawyers' standards. Paralegals sometimes have been held directly liable to consumers but more commonly only the lawyers with whom they work are held liable. The one area in which there is some degree of uniformity involves self-help materials. Authors and publishers of self-help materials are generally not subject to challenge under either product liability or unauthorized practice statutes.

L Recent Efforts to Examine and Regulate Nonlawyer Activities

Several states have recently examined nonlawyer activity. State legislatures have considered a wide variety of measures to regulate legal technicians.[10] Reports from court and bar task forces in California, Arizona, Minnesota and Florida, among others, proposed more explicit or expanded roles for nonlawyers. Bar inquiries in other states, including Nevada and Nebraska, led to reports which did not recommend more explicit or expanded nonlawyer roles.[11] The thoughtfulness of the varied state task force reports bolsters the Commission's general belief that most of the issues discussed in those reports can best be addressed at the state level.

## PART TWO: ANALYSIS, CONCLUSIONS AND RECOMMENDATIONS

The Commission reached three major conclusions when it analyzed the record:

10 A listing of measures considered in recent years by state legislatures is set forth in Appendix C.

Several state task force reports are described in Part One, ~ E of the Report.

Increasing access to affordable assistance in law-related situations is an urgent goal;

Protecting the public from harm from persons providing assistance in law-related situations is also an urgent goal; and

When adequate protections for the public are in place, nonlawyers have important roles to perform in providing affordable access to justice.

The most fundamental conclusion of the Commission, however, was that each state has a unique culture, a specific legal history; a distinct record of experience with nonlawyer activity and a current economic, political and social environment which will affect its approach to varied forms of nonlawyer activity. As a result, the most important conclusion of the Commission is that each state should conduct its own careflil analytical examination, under the leadership of its supreme court, to determine whether and how to regulate the varied forms of nonlawyer activity that exist or are emerging in its jurisdiction.

The information that led the Commission to these conclusions also led it to formulate six major recommendations and to identify a wide variety of actions that practicing lawyers, bar associations, courts, law schools and the federal and state governments might take. Part Two of the Commission's Report sets forth the bases for these conclusions, the recommendations they led to, and the actions that are needed to implement the recommendations.

### A. Increasing the Public's Access to the justice System and to Affordable Assistance With Its Legal and Law-Related Needs is an Urgent Goal of the Legal Profession and the States.

Lawyers have a long tradition of aspiring to assure that justice is available for everyone. Standards of conduct have consistently encouraged *pro bono* and public service activities. Despite this tradition, much remains to be done before all moderate- and low-income persons will have effective access to affordable assistance with their legal and law-related needs.

Many studies identify a massive volume of unmet legal needs among low-income persons. Similar studies focusing on moderate-and middie-income individuals establish that more than sixty percent of the legal and law-related problems of that group are not brought to lawyers or courts. This widespread refusal to use the justice system can be attributed to numerous factors, not the least of which is a matter of individuals' perceptions about their problems:

either they view their problems as not serious enough to justify obtaining legal assistance; they believe that their situation does not warrant paying what they expect to be charged; or they suspect that their problem will cost more to resolve than they can afford.

The Commission heard many reasons for consumers not utilizing the services of lawyers to serve law-related needs: that lawyers are not always available at affordable rates; that for some kinds of specialized issues (for example, special education cases) few lawyers have the knowledge and experience needed; that for damage claims involving relatively low potential recoveries, the available fees may be too low for a lawyer to be able to undertake the work; that there are too few lawyers fluent in languages other than English who can handle the cases of non-English speaking clients; and that lawyers' significant debt burdens and rising operating costs put lawyers under economic pressure to

Consequently, beyond the expansion of traditional paralegal roles, more widespread approval for nonlawyer roles in state administrative agencies, and continuation of nonlawyer activity which is already lawful, the Commission recommends that the states adopt an analytical approach in assessing whether and how to regulate other varied forms of nonlawyer activity that exist or are emerging in their respective jurisdictions. The Commission further recommends that the criteria for this analysis include the risk of harm the nonlawyer activities present, whether consumers can evaluate providers' qualifications, and whether the net effect of regulating the activities will be a benefit to the public. Finally, the Commission recommends that the highest courts take the lead in examining specific activities within their jurisdictions, with the active support and participation of the bar and the public

The Commission recommends a specific analytical approach for use by the states in determining what level of regulation, if any, is appropriate. The approach will help in assessing whether a particular activity should be unregulated, regulated or prohibited. Three broad criteria are suggested:

1. Does the nonlawyer activity pose a serious risk to the consumer's life, health, safety or economic well-being?

2. Do potential consumers of law-related nonlawyer services have the knowledge needed to properly evaluate the qualifications of nonlawyers offering the services?

3. Do the actual benefits of regulation likely to accrue to the public outweigh any likely negative consequences of regulation?

Regulation of a nonlawyer activity may be needed if the activity presents a serious risk, if consumers cannot protect themselves against that risk because they will find if difficult or impossible to evaluate the nonlawyer service

provider's qualifications, or if the likely benefits of regulation outweigh the likely negative consequences of regulation. The type of regulation chosen will depend upon the predicted costs and effectiveness of different options for reducing the predicted harm while avoiding counterbalancing negative consequences. The activity should be prohibited if no regulatory approach will effectively and economically achieve acceptably low levels of harm to consumers.

The first criterion involves judgments about degrees of injury. Of course there is some risk of harm in every activity. A state will need to consider how frequently a nonlawyer might make mistakes, whether those mistakes will actually cause injury, how substantial the injury will be, whether there is an effective remedy if injury occurs, and if there is any experience in other states on which to make such judgments. If there is relatively little serious risk to life, health, safety or economic well-being, regulation may not be needed.

The Fifth criterion asks whether consumers can protect themselves l,y asking provider qualifications, and will turn on whether the consumers will know what qualifications may be relevant and will be able to evaluate them. This criterion does not rely on the consumer's ability to directly assess the quality of services provided because this is very difficult to do when professional services are involved. If consumers can protect themselves, then regulation may not be needed.

The third criterion involves balancing the actual benefits likely to arise from regulation against any negative consequences of that regulation. Although regulation or prohibition of an activity can reduce the risk of harm to consumers who cannot protect themselves adequately, some levels or forms of regulation may reduce access to justice. For example, will the regulatory system cause nonlawyers to raise their prices so much that increases in access will be lost? Moreover, certain forms of regulation may not provide adequate protection. In that regard, it will be essential to identify whether the regulatory system under consideration can and will actually be enforced.

At the root of this balancing lies a difficult question which each state will have to assess. How much does the consumer's interest in having at least some assistance from a nonlawyer justify the increased risk of harm to that consumer from possibly lower quality assistance?

**state'** conduct assesments, they should consider a wide range of regulatory possibilities, depending upon the activity to be regulated. Among the simplest are consumer protection laws, unfair and deceptive trade practice statutes, criminal laws against fraud and the traditional remedies of actions sounding in negligence. A second group of regulatory possibilities includes design of affirmative consumer remedies, such as insurance, bonding, arbitration and mediation, or client protection fund requirements. A third approach is regulation through control of the forum, such as that found in administrative agencies, and might include prescribing forms, limiting access to the tribunal and requiring disclosure of the provider's nonlawyer status.

Finally, for certain types of activities, states will want to explore regulation by registration, certification or licensure. In this exploration, regulatory systems might include requirements related to disclosure, education, age, work experience, specialized training, recordkeeping, continuing education, compliance with ethical standards, disciplinary procedures and admission examinations. The report concludes by giving examples of how these criteria might be employed by a state in its assessment of several common situations in which nonlawyer activity has been considered. The situations vary in complexity, potential for harm and in other ways, permitting the reader to see sample application of the Commission's proposed analytical framework. These examples include the document preparer who types or otherwise completes court-approved forms or other forms, the legal technician who assists a self-representer by providing both typing services and limited advice about a "simple" divorce, a legal technician who assists in a residential real estate sale, and a battered women's shelter advocate who, functioning as a legal technician, advises and assists a client in filing a complaint, seeking police action and preparing papers for a protective order.

Conclusion

The Commission's Report amply demonstrates that nonlawyers provide services which in many instances relate to the practice of law. We believe that this report fulfills the mandate of the Commission to investigate the extent of; and the areas in which, such practice takes place. The factual findings of the Commission demonstrate that nonlawyers, both as paralegals accountable to lawyers and in other roles permitted by law, have become an important part of the delivery of legal services, and that their expertise and dedication to the system have led to improvements in public access to affordable legal services. The work of the Commission has also uncovered many inadequacies among lawyers in providing professional services which have given rise to increasing dissatisfaction with our profession by the public. The debate over delivery of law-related services and their cost is a public concern that will be debated by the public, not just by the legal profession. This Report should be viewed by the bar as an opportunity to take those steps which will protect the public and at the same time provide increased access. If this Report is to have any value, it will be in the thoughtftil consideration of it by the bar, the judiciary and the public. In the first instance, the bar must take the lead to assure that legal services are rendered in a manner which will enhance public respect for the institutions of justice.

SUMMARY OF RECOMMENDATIONS

whereas, Increasing the Public's Access to the Justice System and to Affordable Assistance With Its Legal and Law-Related Needs Is an Urgent Goal of the Legal Profession and the States; and

Whereas, The Protection of the Public from Harm Arising From Incompetent and Unethical Conduct By Persons Providing Legal or Law-Related Services Is an Urgent Goal of Both the Legal Profession and the States; and

whereas, When Adequate Protections for the Public Are in Place, Nonlawyers Have Important Roles to Perform in Providing the Public With Access to Justice;

THEREFORE, The American Bar Association Commission on Nonlawyer Practice Recommends:

1. The American Bar Association, State, Local and Specialty Bar Associations, the Practicing Bar, Courts, Law Schools, and the Federal and State Governments Should Continue to Develop and Finance New and Improved Ways to Provide Access to Justice to Help the Public Meet Its Legal and Law-Related Needs.

2. The Range of Activities of Traditional Paralegals Should Be Ex-Expanded, With Lawyers Remaining Accountable for their Activities.

3. States Should Consider Allowing Nonlawyer Representation of Individuals In State Administrative Agency Proceedings. Non-lawyer Representers Should Be Subject To the Agencies' Standards of Practice and Discipline.

4. The American Bar Association Should Examine Its Ethical Rules, Policies and Standards to Ensure that they Promote the Delivery of Affordable Competent Services and Access to Justice.

5. The Activities of Nonlawyers who Provide Assistance, Advice and Representation Authorized by Statute, Court Rule or Agency Regulation Should Be Continued, Subject to Review By the Entity Under whose Authority the Services Are Performed.

6. With Regard to the Activities of All Other Nonlawyers, States Should Adopt an Analytical Approach in Assessing whether and How To Regulate Varied Forms of Nonlawyer Activity that Exist or Are Emerging in Their Respective Jurisdictions. Criteria for this Analysis Should Include the Risk of Harm These Activities Present, whether Consumers Can Evaluate Providers' Qualifications, and whether the Net Effect of Regulating the Activities Will Be a Benefit to the Public. State Supreme Courts Should Take the Lead in Examining Specific Nonlawyer Activities Within Their Jurisdictions With the Active Support and Participation of the Bar and Public.

No._____

In The

Supreme Court of the United States

October Term, 1997

*

ROBIN SMITH,

*Petitioner,*

v.

OREGON STATE BAR,

*Respondent.*

*

Petition For Writ of Certiorari

To the Oregon Supreme Court

*

# PETITION FOR WRIT OF CERTIORARI

*

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*Pro se*

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MR. REEL: We will do so, Your Honor. MR. ABBOTT: Second motion for directed verdict, Your Honor, goes to one of our affirmative defenses. It's the freedom of speech issues that we've raised by our affirmative defense, both under the United States Constitution and under the First Amendment. And this will sort of dovetail into due process of defense, that I'm also going to raise as a motion for directed verdict, likewise under both the federal and state constitutions.

What we're talking about in this case, based on the plaintiff's evidence, is that there is no doubt that there is some form of commercial speech. In the aggregate litigation, at the end of the case, if there is an end of the case, if I don't prevail on these motions

THE COURT: Well, there could be an end, but it could be ending later.

MR. ABBOTT: If it ends later, if I put on evidence, if you tell me to come back on Wednesday, there is another kind of speech involved in the case that will be in our case. But based on just the plaintiff's case, it seems to me we have commercial

speech involved.

It's analogous to, although clearly different from, the Bates decision, the attorney advertisement case that the U.S. Supreme Court took on some time ago. And clearly the Supreme Court said there are safeguards available to lawyers. There are safeguards available to commercial speech, regardless of whether you're a lawyer or not. And the issue that I think comes about under this case, under 9.160 and the related enforcement statute, is whether my clients, collectively, whether their right to freedom of speech has been infringed upon because, in effect, we don't know what the practice of law is. What we have is an undefined phrase. What we have is the Oregon Supreme Court, through a series of cases -- and if your Your Honor has read them now --THE COURT: Twice now. MR. ABBOTT: -- basically saying, "We don't need to decide them," just that "In this particular case, this is" or "This isn't" or "This did" or "This didn't cross the boundaries." And that's it. That's what the Supreme Court has done. What it's constantly done is refused to, for whatever reason, or chosen not to define the practice of law. Clearly

the legislature hasn't done that.

When I was back reading the cases again, it as the Security Escrows case, I believe Let me double check that. Yes, it was. If you go back and reread the Securities Escrow case, there is a dissenting opinion by Justice O'Connell. I forget if e was chief justice at the time or just a justice.

THE COURT: But in any event, he was the smartest one. I worked for him, so I think that he as the smartest one.

MR. ABBOTT: I and Mr. Reel both worked for Judge Tongue.

THE COURT: He used more words.

MR. ABBOTT: He did do that, but he is a very fine man and I think very highly of him, as I'm sure my colleagues do. But his reasoning, as you may recall -- and Justice Sloan joined in is that this is a situation where the legislature ought to be defining it. He disagreed with the majority. He thought they should have come to a different conclusion. But he believes that the Court does not have the inherent authority or power to reach that ultimate resolution. It's a legislative question. It seems to me that Justice O'Connell's reasoning is right.

the role of the court in defining the practice of law was expressed by the Florida Supreme Court in a 1980 case upholding a Florida statute that permitted non-lawyer representation before Florida's workers' compensation board. The Florida court held that the legislature has concurrent power with the court to define the practice of law and can pass laws "in aid of the judiciary."[65]

The Commission heard testimony that in southern New Jersey, it was wide-spread practice for realtors and tide companies to handle all aspects of residential real estate transactions where neither the seller nor buyer was represented by legal counsel, while in northern New Jersey such activity was handled only by lawyers. The UPL Committee of the New Jersey State Bar considered the South Jersey practice to be the unauthorized practice of law. Shortly before the publication of the Commission's report) the New Jersey Supreme Court resolved the issue and unanimously held that the nonlawyer practice of handling residential real estate closings without the involvement of legal counsel does not constitute the unauthorized practice of law so long as brokers and tide officers conform to specific conditions, including advising buyers and sellers of the general risk involved in not being represented by attorneys.~

The overbreadth of many UPL laws and the vagueness of their definitions soon elicited criticism from both business and academia. For example, then Har'~d Law School Dean, the late Erwin N. Griswold, while spealting before the Section on Taxation of the ABA in *1955* about the desire of accountants to expand their activities into areas thought by many lawyers to be the practice of law, said:

> The problem is often put in terms of "practice of law" Only lawyers can "practice law," it is said, and if what an accountant is doing is "practice of Law," then he is acting improperly.

65 The Florida Bar V. Moses, 380 So.2d 412 (Fla. 1980). Courts differ on whether they have inherent power to regulate law-related activities by nonlawyers which are conducted outside of courts, they share power with legislatures, or whether their decisions are subordinate to legislative will. See *generally* Marlene Remmert, *Note: Representation of Clients Before Administrative Agencies: Authorized or Unauthorized Practice of Law?* 15 VALPARAISO L.REv. 568 (1981). *See also* discussion *infra* Part One, § B3.6 In re Opinion No.26 of the Committee on the Unauthorized Practice of Law, *654* A.2d 1344 (NJ. 1995) *(per curiam)*. The NewJersey Supreme Court held that the prohibition against the unauthorized practice of law serves to protect the public against unskilled advice but that the prohibition is not automatic. The most important

question, the court held, is whether the public interest is disserved by permitting the conduct, and that determination must be based on practical considerations and common sense, using a complete and detailed record that includes the extent, length of existence, effect and result of the performance by nonattorneys of the activity in question and a showing of the public need for such nonlawyer activity~ The court then found that the record before it showed that the nonlawyer activity at issue had been conducted "without any demonstrable harm to sellers or buyers, that it apparently saves money, and that those who participate in it do so of their own free will presumably with some knowledge of the risk *Id* at 1359. The court determined that the public interest is sufficiently served if advance written notice is given parties of their right to retain counsel and the risk of not doing so. Finally, the court stated, while "[w] e firmly believe the parties *should* retain counsel.... We decide only that the public interest does not require that the protection of counsel be forced upon the parties against their Will." *Id* at 1360.

I feel fairly sure myself that this is not a sound way to approach the problem. The trouble is that it really begs the question. If we start with that approach, then the conclusion is going to follow as surely as the night follows the day that much of what the accountants have long and customarily done is improper for them to do. The people who think in terms of "practicing law"-and this includes many of those who have been active on unauthorized practice committees~proceed from that major premise to a minor premise that if the problem involves a matter of law, such as the application of a statute or regulation or court decision, then it is practice of law" and can only be done by a lawyer. But this is surely too broad.... Obviously, there are many things involving the law and its application which can and must be done by non-lawyers. The "practice of law" is not a safe and sound approach, it seems to me, if it is taken to include a rule that any matter involving application of statutes, regulations and court decisions can only be handled by a lawyer.

It would be my own view, for what it is worth, that this is the error into which the trial court has fallen, to some extent, in the well known *[Agran]* case. The court has taken a too literal, or semantic, view of the concept of "practice of law," and has not recognized that there are many things that lawyers do which are properly also done by others. The concept of "practice of law" cannot be as exclusive as it sounds when it is put in those terms. There is a very considerable overlap at the edges, and injustice is done if that overlap is not recognized.[67]

Even though courts have found it difficult to arrive at a generally acceptable definition of the practice of law, the bar at one time found another method of defining the boundaries that could not be crossed by nonlawyers. By negotiating agreements with associations representing other professions, it was possible to lessen the friction that was created through the enforcement of UPL byjudicial or quasi-judicial means. Some of the first agreements were negotiated at a local level in the mid-i 9[2]0s while national agreements, known as "statements of principles," were negotiated by the ABA beginning in the early 193Os.~

The ABA statements of principles were negotiated by "national conference groups" formed to bring together lawyers and representatives of other professional groups with which there was the possibility of conflict with UPL prohibitions. The primary written product of the conference groups were the statements of principles that were intended to govern the interaction between clients, lawyers and the members of the subject nonlawyer profession. The statements were meant to clearly establish what constituted the practice of law

67 Erwin N. Griswold, *A Further look: lawyers and Accountants, 41* A.B.A J. 1113, 1114 (1955). Dean Griswold's remarks, delivered at the 1955 ABA Annual Meeting in Philadelphia, were reprinted as an article in the *ABA Journal* The case cited in the quoted passage is Agran v. Shapiro, *supra* note 62.

68 Christensen, *supra* note 12, at 195-96. The texts of the various Statements ofPrinciples were published in the corresponding year's volume of the *Marnnaa~-Hubhdl Law Directoiy. Id* at 211.

and what did not in a particular professional area of interest. The first ABA agreement of this kind was written in cooperation with the American Bankers Association in 1933. The conference groups were given formal status when the ABA structure was reorganized in 1936.

Over the years, the conference groups included, among others, such varied service providers as accountants, architects, the insurance industry, collection agencies, real estate tide companies and social workers. Although several of the conference groups presently continue to perform the flinction of facilitating communication between lawyers and professional groups with similar substantive interests, there was a movement in the late 1970s and early 1980s to change the character of the Association's UPL activities. By 1982, the ABA House of Delegates had rescinded all of the 28 statements of principles that had once been in effect.[69]

69 *See James* Podgers, *Statements ofPrincipl's: Are Th~ on the Way Out?, 66* A.B.A J. 129-130 (1980) (describing the bar's declining interest in maintaining agreements with other professions). Some of the conference groups continued after 1982 to submit reports to the Standing Committee on National Conference Groups, which was established in August 1970, restructured in 1980, and finally disbanded in 1994. At the ABA Annual Meeting in 1994, three National Conferences were continued as freestanding entities: National Conference of Lawyers and Certified Public Accountants, National Conference of Lawyers and Corporate Fiduciaries and National Conference on Lawyers and Representatives of the Media.

not always require lawyers; and nonlawyer providers have promoted their services in both traditional and new arenas.[442]

Many who appeared before the Commission agreed that lawyers are ordinarily essential for competent representation before tribunals that have formal evidentiary rules and involve complex matters. In any forum, the representation of group rights, the prosecution of test cases, and law reform advocacy almost always require the special skills of lawyers. At the other extreme, while lawyers can assist retired persons in applying for social security benefits, these applications do not ordinarily require a lawyer's skill.~ Of course there may be circumstances where it would be important to have a lawyer for any matter, even for a social security application. The seemingly routine social security application may be denied or there may be a dispute over what the benefits should be, and appeals may be required all the way through federal court. Notwithstanding this possibility, most Americans do not hire lawyers when they apply for social security~ In between are numerous circumstances when a lawyer's services may or may not be essential to the competent handling of the matters.

## 3. NONLAWYERS HAVE IMPORTANT ROLES TO PERFORM

The Commission has concluded that nonlawyers who provide services already authorized by law perform important roles. It recommends, therefore, that the activities of nonlawyers who provide assistance, advice and representation authorized by statute, court rule or agency regulation should be continued, subject to review by the entity under whose authority the services are performed.

The Commission's record shows that many people are unaware of the extensive role nonlawyers already occupy in our legal system.~ The extent and type of nonlawyer activity varies widely among the states because each state has developed its own, locally focused, methods to meet citizens' needs, deploying nonlawyers in many different ways.

Part One of our Report describes many types of important and authorized nonlawyer activities. For example, as previously discussed, the traditional paralegal has ever increasing importance and may be able to play an even larger role in the fliture. Similarly, we have also noted that nonlawyers have an important role to play in helping people with many kinds of administrative agency problems. In particular, the Commission received extensive information

about the high quality of services provided by nonlawyers employed by religious and sec-

442 The Florida Bar Special Committee on Non-Lawyer Practice noted:

In addition to the economic principles discussed above [affordability of lawyers' services] it also appears that many people simply prefer to use non-lawyers for routine legal services even if comparable services [are] available by lawyers at a competitive price. THE FLORIDA ~ REPORT OF THE SPECIAL COMMITTEE ON NONLA~~R PRACTICE, *supra* note 82, at 6.

~ *See* opinions of Justices Douglas and Rehnquist, *supra* notes 394 and 395.

444 Many of these roles are discussed earlier in Part One, ~ B2-5. Performance of those roles often involves giving advice on legal matters.



ular nonprofit agencies. One important example is in the immigration area where nonlawyers assist immigrants and refugees, many of whom would otherwise be unrepresented.

Compelling testimony disclosed that in some instances even grassroots mutual support assistance has been effective and has met needs not served by the practicing bar.~[44]~ Some state bar task forces examining nonlawyer activities in their states also concluded that some document preparers and legal technicians are competently and adequately assisting self-represented persons who are not served by the bar.[446]

Although there are many circumstances in which a lawyer's services are essential, or at least advisable, the Commission's record establishes that non-lawyers also have important roles to play and that their assistance enhances the justice system. Further, performance of these roles necessarily entails the giving of some legal advice. It is exceedingly difficult to draw a bright line to determine circumstances when a lawyer's skills are essential.~[7]~ Many business people and other professionals handle matters that inevitably involve the law, and they give advice about that law. As former Harvard Law School Dean Erwin Griswold noted in 1955, "obviously there are many things involving the law and its application which can and must be done by nonlawyers."[448] In 1969, the ABA and the American Institute of Certified

Public Accountants jointly acknowledged this f~ct in a statement of principle which was in effect at the tirne, stating:

> In our complex society; the average citizen conducting a business is confronted with a myriad of governmental laws and regulations which cover every phase of human endeavor and raise intricate and perplexing problems. These are flirther complicated b/ the tax incidents attendant upon all business transactions. As a result, citizens in increasing numbers have sought the professional services of lawyers and certified public accountants....Frequently the legal and accounting phases are so interrelated and interdependent and overlapping that they are difficult to distinguish. Particularly is this true in the field of income taxation where questions of law and accounting have sometimes been inextricably intermingled.[449]

*See* discussion of nonlawyer assistance to handicapped children and battered women, *supra* Part One, § B4b.

446 *See* Part One, ~ E for a discussion of some recent task force reports reviewed by the Commission during its deliberations.

~ *See generally* Rhode, *supra* note 71.

448 Griswold, *supra* note 67, at 1114. *See aAo* Morrison, *supra* note 103. *See aLso* ABA, "...IN THE SPIRIT OF PUBLIC SERVICE": A BLUEPRINT FOR THE RE~DLING OF LAw~R PROFESSIONALISM, *supra* note 1, at 301, which concluded:

> [I]t can no longer be claimed that lawyers have the exclusive possession of the esoteric knowledge required and are therefore the only ones able to advise clients on any matter concerning the law.

449 The statement was contained in a 1969 Atnerican Bar Association Statement of Principal issued jointly with the Council of Certified Public Accountants. Statements of Principles between the ABA and other professions are no longer in effect. *See supra* notes
68~9 and accompanying text.

The U.S. Supreme Court observed that drafting the specifications and claims of a patent application constitutes "one of the most difficult legal instru ments to draw with accuracy.... And upon rejection of the application, the practitioner may also assist in the preparation of amendinents.. .which fre-

quently requires written argument to establish the patentability of the claimed invention under the applicable rules of law and in light of the prior art. "[450]

Notwithstanding the legal difficulties alluded to, the Supreme Court concluded unanimously that nonlawyers, who are subject to admission and discipline requirements of the Patent Office, can perform the activities of patent law practice as well as lawyers. The Court barred states from interfering with nonlawyer patent practice through application of unauthorized practice of law rules.[451] The Court reached this conclusion even though it recognized that the nonlawyer activity would necessarily involve the giving of legal advice, stating that patent work *"iner'itably* requires the practitioner to consider and advise his clients as to the patentability of inventions under the statutory criteria.. .as well as to consider the advisability of relying upon alternative forms of protection which may be available under state law."[452]

The history of practice before the U.S. Patent and Trademark Office is instructive. The problem of unscrupulous nonlawyer patent agents at one time had become a national scandal and led to several Patent Office reforms. The Supreme Court noted that nonlawyer agents were "[p] articularly responsible for the deceptive advertising and victimization of inventors which long plagued the Patent Office."[453] Rather than outlawing all nonlawyer patent agents, the Patent Office tailored reform toward good moral conduct requirements and required patent examinations of both lawyers and nonlawyers. The Supreme Court noted that this reform effort successftilly rooted out incompetent and unscrupulous persons without disquali~ing a whole class of persons:

So successftil have the efforts of the Patent Office been that the Office was able to inform the Hoover Commission that there is no significant difference between lawyers and nonlawyers either with respect to their ability to handle the work or with respect to their ethical conduct. ~

The Patent and Trademark Office, like other agencies with highly developed regulatory systems, offers a model which is both protective of the potential client and also not unduly exclusionary as to choice of representative.

450 Sperry ~ Florida *ex reL* The Florida Bar, 373 U.S. 379, 383 (1963) (citation omitted).

451 *Id* at 404. The U.S. Patent and Trademark Office issued regulations under a 1952 federal statute allowing patent applicants to be represented by nonlawyer "agents", as well as by lawyers, at their choice. The regulations established a register for nonlawyer patent agents. The U.S. Supreme Court held that the State of Florida was preempted by federal law from interfering with the work of patent agents living in Florida, including the part of the practice in Florida that was incidental to the preparation and prosecution of patent applications before the Patent Office.

452 *Id* at 383 (emphasis added).

*453 Id* at 390.

*454 Id* at 402.

The Commission cannot anticipate the details of debate within each state about precisely where the state should draw a line between permissible and nonpermissible nonlawyer activities. Rather, the Commission's purpose is to report on the wide array of norlawyer practices it has found, to comment generally on their potential or risk in the search for solutions to people's legal and law-related problems, and to flag situations that may require prophylactic measures to prevent harm. With these purposes in mind, the concluding sections of the Commission's recommendations will discuss how a state might decide to permit, regulate or prohibit specific nonlawyer activities.

In sum, the Commission finds that the legal profession has always shared, and will continue to share, the provision of at least some of its services with nonlawyer providers, notwithstanding that most states have laws forbidding the unauthorized practice of law. Thus, in the fliture, some citizens will continue to employ lawyers for all of their legal needs, while others will not. Most people are likely to prefer lawyers for many, although not all, matters. Some citizens are likely to continue to prefer to proceed on their own without the assistance of anyone, at least in some circumstances.

Americans are independent-minded and historically value choice in purchasing services of any kind. Governmental efforts to restrict individual choice are, thus, unpopular in this country. Further, we can reasonably assume that when consumers know the pros and cons of the choices of assistance, they will make reasonable ones with which government need not unduly interfere.

The current array of approaches to federal tax preparation and advice, a law-related area that affects almost everyone, shows the range of choices that can be available:

Many citizens study the applicable tax laws and prepare their own tax returns with nothing more than the IRS Instructions.

Many others use seff-help books, and some use sophisticated sofrware that does the math, answers questions, produces filled-in forms and electronically files them.

IRS employs large numbers of noulawyers to provide tax advice which taxpayers rely upon even though IRS is not bound to honor the advice.

Nonlawyer providers also regularly assist taxpayers for fees, providing advice about tax law and preparing tax forms. Some of these providers receive

intense though relatively brief training, and work in high volume clinics that are typically located in shopping malls, store fronts and other neighborhood locations, and often employ multilingual staffi. Others operate as sole proprietorships and are not required to demonstrate any accounting or legal qualifications.

Still other nonlawyer providers are highiy trained, skilled and regulated, such as Certified Public Accountants.

Nonlawyers who become ~'Enrolled Agents" by passing an IRS examination may both prepare returns and represent taxpayers at all levels of agency proceedings, including appeals from matters handled by others. (Taxpayers can, of course, represent themselves in all such proceedings, CPAs can appear in such proceedings without becoming Enrolled

hearings, the presence and role of the nonlawyers involved is disclosed and the tribunal or agency is empowered to bar from flirther activity any nonlawyer whose conduct is inappropriate, improper or of poor quality. Establishing similar controls over nonlawyer activity in additional agencies and in tribunals is an option for states to consider.~[8]

In some circumstances, it is possible to exercise regulatory authority over the forum in which nonlawyer activity may occur rather than having to put in place direct controls over nonlawyer behavior. For example, a California judge developed and adopted specific forms for use by *pro se* litigants. The approved forms require explicit disclosure of any nonlawyer who assisted a party. The judge offers training classes for legal technicians and document preparers who have been assisting seiFrepresented persons. If forms are incorrectly prepared, the judge will prohibit the nonlawyer involved from rendering flirther assistance on such forms to be filed in the court.

Similarly, the Florida Supreme Court prescribed forms that may be used for self-representation in several types of cases. Nonlawyer assistance to a party must be disclosed. The courts in which the forms are filed bar flirther assistance by nonlawyers whose customers' forms are repeatedly in error.

Even in the absence of approved forms, a state can require that all forms filed by self-repr'ssented persons disclose whether a nonlawyer assisted in preparing the foirms. If a document preparer or legal technician makes repeated errors, a court can require the nonlawyer to take a training course or simply bar the non-lawyer from offering assistance. Court rules that regulate

nonlawyer assistance might include civil sanctions or criminal penalties for violations.

The Barrkruptcy Code amendinents of 1994 place controls upon bankruptcy petition preparers who were previously unregulated. They must sign the documents they prepare and include their social security numbers. Provisions are made for the disclosure of fee arrangements and the avoidance of fraud.~[9]

**d. REGISTRATION, CERTIFICATION AND LICENSING**

There are three common types of more extensive regulatory control that states may consider:[470]

Registration-a record containing a list of names. An individual would file her or his name, address and, possibly, qualifications with a government agency, and perhaps agree to be bound by certain standards, before providing services.

Certffication-registration and permission from an identified authority to use a specific occupational title based on meeting certain qualifications. The law could limit the use of the title to only those meeting the qualifications,

468 States may find it particularly attractive to consider regulation over nonlawyer activity through the forum when other states have already used that regulatory approach for the same Icinds of matters or activities.

469 Bankruptcy Reform Act of 1994, 11 U.S.C ~ 110.

470 These definitions have been derived from the general regulatory structure used by the Council on Licensure, Enforcement and Regulation (CLEAR), an affiliate organization of The Council of State Governments. *See* Shimberg and Roederer, *supra* note *463*.

such as "Certified Legal Assistant," "Certified Paralegal" or, potentially, "Certified Legal Technician." Non-certified individuals may still offer services if they do not use the occupational title.

bcensing-registration and a requirement that the nonlawyer meet formal state standards, perhaps through testing or education, to offer services. Licensing could include certification and the use of a restricted occupational title.[471] All of these regulatory approaches share the following characteristics:

identification of a state or local governmental agency with administrative responsibility;

specification of qualifications required to meet minimum standards (a list of possible qualifications appears in the following subsection of the Commission's Report);

the opportunity to enumerate standards for activity;

the possibility of exclusion from flirther activity; and

the need to identi~ sanctions for impermissible activity under the regulatory scheme and to delegate responsibility for enforcement.

Registration is the least restrictive regulatory tool. Minimally, registration pr~ duces a roster of service providers. Recently, the California legislature considered a bill requiring registration of all document preparers and legal technicians so that they could be observed by the judiciary and a consumer affiurs agency[472] Perhaps most important, a registration requirement precludes unregistered persons from engaging in the regulated activity. Registration also gives the public li~t of service proYi~cr3.

Registration can establish minimum service standards and can require proof that the nonlawyer meets basic qualifications. For example, minimum age and education requirements might be required for registration or the form could require the registrant to disclose that he or she was not a lawyer.

471 Of course, these terms are often used with far less precision in practice than they are in their definitions here. For example, "Registered" Nurses and "Certified" Public Accountants are actually engaged in licensed professions, and certification by professional associations (such as bar or legal assistant associations) may have no connection to governmental regulation by "certification." Further, a learner's permit to drive an automobile and a lawyer's privilege to practice law each involve licensure, even though the prerequisites for each are dramatically different.

Jurisdictions may encourage the voluntary registration of bicycles for the purpose of facilitating the return of lost or stolen property~ but the Commission is using the term registration in its mandatory sense as a prerequisite for offering a service.

472 *See* California Assembly Bill 1287, introduced March 3, 1993. An amended version of the bill called for the State Judicial Council and the State Department of Consumer Affairs to establish a joint task force to conduct a comprehensive study to identify all nonlawyer providers, required the participation of all nonlawyer providers and prohibited any nonparticipant from providing nonlawyer services. Assembly Bill 1287, as amended August 27, 1994 in the California Senate. The amended version of the bill did not require participation by document preparers, authors or publishers of self-help materials or by legal technicians who are authorized by federal or state law to provide legal assistance or appear before any tribunal. *Id* at § 202. On the last day of the legislative session, the bill was withdrawn by its sponsor, Gwen Moore.



Certification identifies a group of registrants as specifically qualified to provide services. Those certified can use a unique occupational title so that they can easily be distinguished from those who have not been certified.

Certification may be a valuable tool to inform the public of those qualifications or credentials considered to be appropriate for nonlawyer activities while still providing the public with a free choice of providers. Certified nonlawyers may publish their superior qualifications and even charge a higher fee. The public would be free to place its own value on certification and choose to pay or not pay any higher fee that may result.

While certification may normally imply a complete set of standards that define a high level of competency related to relevant tasks, this is not always the case. Certification standards may be simple and easily satisfied. Certification standards should reflect the required skills so the public is reasonably assured the nonlawyer can provide competent services.

Certification systems are generally more expensive than registration because they require development of competency tests. Creation of a two-tiered system of service providers naturally leads to friction at the boundary; with certified providers having a substantial stake in ensuring that uncertified individuals do not claim the restricted occupational title or undercut its marketability;

Licensure is the most complex and restrictive form of regulation. It is a process by which a government agency grants individuals formal authorization to do a specified thing upon finding that they have met certain educational and professional standards required to ensure that the public's personal and economic well-being will be reasonably well protected.

It is illegal for anyone who does not hold a valid license to hold himself or herself out as licensed to provide services for which a license is required. Nev-

ertheless, the requirements for licensure may be easily satisfied or they may be extraordinarily difficult to flilfill. The requirements for licensure can be carefilly tuned to eliminate or mitigate the harm to the public arising from a non-lawyer by demanding a demonstration of the minimal competency considered necessary by the jurisdiction to provide that service. The minimal competency may be low or high, but only those who demonstrate that they have minimal competency will be permitted to serve the public.

Licensure is generally the most expensive form of regulation to implement, since it requires competency testing, standard setting and policing of unauthorized service provision by those not licensed.

**e. Requirements that might be Included In RegistratIon, Certificafion or Licensure Systems**

When a state considers the more extensive regulatory systems it will also appraise what conduct, admission and retention requirements will be part of the system. The following eight requirements may be useftil to consider as states assess whether to develop new regulatory systems for nonlawyer activities. States will undoubtedly find other possibilities.

i. DISCLOSURE: Disclosure requirements may be a useful part of a regulatory scheme to avoid consumer confusion and make misrepresentation more difficult. Disclosure by nonlawyers that they are not lawyers is a simple and effective means to assist consumers in assessing service provider qualifications and the reason-

ableness of the fee. Consequently, the Commission recommends that document preparers and other nonlawyer providers of services in law-related situations should be required to openly disclose that they are not lawyers and to indicate that without the client-lawyer relationship there is no evidentiary privilege and no obligation to preserve confidentiality.

While there are innumerable possible disclosure statements, some of the more likely are the following:

I am not a lawyer.

I do not provide legal advice (or) I am not permitted to give legal advice. am not an "abogado" nor a notario publico" (lawyer). I am an epignada publica" (notary/scrivener). This and all other notices should be in both Spanish and English in any location that has Spanish-speaking clients. Similar notices in other languages can also be required.

No client-lawyer privilege exists regarding my professional relationship with you. [This should be explained to the consumer.] 473
I have no obligation to keep confidential any information you tell me, and the law places no obligation on me to keep your secrets.
My educational background or degrees are as follows:...

These and similar disclosure statements might be required to be displayed prominently in a public area in the nonlawyer's offices, stated and explained in a document presented to a customer before services ate provided and acknowledged in writing by the client. Also, a state might require that nonlawyer-prepared documents beer the nonlawyer's name and address and registration number.

***ii. General Education an Age Requirements***

Both minimum age and education requirements address the general maturity and sophistication of a nonlawyer, but neither is directly related to non-lawyer competency. The Commission heard a variety of testimony regarding age and education requirements, with minimum educational levels proposed that ranged from none to four years of college with some postgraduate work~

iii. ***Work Requirments***

Many who testified before the Commission recommended a work requirement related directly to the skills necessary to perform specific activities. Of course, any requirement should be reasonably related to the work to be done, and it would be inappropriate to assume that one kind of nonlawyer experience necessarily created qualifications for another kind.

In some regulatory systems, satisfaction of a work experience requirement can substitute for a minimum education requirement. Witnesses testified that many paralegals and legal technicians have years of valuable experience but may have only a high school education or less. Paralegals in legal services pro-grams, for example, often come from the communities they serve and have little formal education before working as advocates. Yet, they are often reported to be among the best advocates before administrative tribunals. Because on-

States may wish to consider whether to create a nonlawyer version of the client-lawyer privilege or the duty of confidentiality~



the-job skills training may be the most important indication of a nonlawyer's competency, a general education requirement without a work experience alternative is probably inappropriate.

***liv. Specialized Training or Education Requirment***

Like work experience, qualification to perform nonlawyer activities through specialized training or education should be directly related to the skills necessary to perform the activity. Different programs can be required for different types of activities. Someone qualified by the state to assist self-represented persons in small estate probate matters would not be presumed competent to represent battered spouses in proceedings to obtain a protective order against farther abuse. Similarly, a tax preparer's specialized training would have little to do with appearing in a visa matter as an accredited representative.

There is likely to be great variation in training requirements for specific services. To assist self represented persons seeking name changes, the training period might be less than a day To represent special needs children, based on one training pro gram that is already in use, training may extend for a year and indude clinical as well as classroom preparation.[474] If regulatory systems are established, the training

requirements for specific activities can be developed by working groups consisting of both legal and paralegal educators and practitioners.

Witnesses reported that most existing nonlawyer training programs are designed primarily to train traditional paralegals. The curricula in these pro-grams, like the curricula in most law schools, is designed to provide the student with a broad background in the law, research skills, an understanding of the legal system, substantive law, and other areas, but generally do not provide skill-specific training or hands~on clinical experience of the kind discussed in this section. These curricula can, however, be revised or new training programs can be designed by these educational institutions.

As already noted, there are relationships between specialized training requirements and work experience requirements; in some circumstances, regulators may conclude that satisfaction of either one of the requirements is sufficient.

***V. Maintenance of Client Records Requirment***

A record of the names, addresses and telephone numbers of all clients may be required. If a record is necessary it should be maintained to the fullest extent possible. Additionally, a record of the dates of services provided and a short description of the type of services provided may be required.

***Vi. Continuing Education Requirment***

A minimum number of hours of practice-area specific continuing legal education may be required annually. This can include in-house training, and some of the hours of the requirement may be satisfied by self-study using appropriate materials, including law school texts, audio and video taped legal training lessons, and interactive legal training software.

*474 See* Parent Information Center of New Jersey, Advocates' Training Program
**1992-1993** Curriculum and Materials, Teaneck, N.J.

vii. ***Ethics Standards and Disciplinary Systems***

A regulatory system may include adoption of a set of rules of professional conduct and a method for enforcing those rules that includes a disciplinary procedure and sanctions such as private and public censure and expulsion from the occupational group. Many regulated professions other than the legal pro fession already adopt such regulatory systems.

Training in ethics and professional standards of practice might be required as part of a work experience requirement, a training requirement or a continuing education requirement.

***vii. Examination Requirment***

A skills-specific, practical examination may be required before a nonlawyer is qualified to use an occupational tide or provide law-related services. Skills examinations are designed to provide assurance of minimum qualifications. Ideally, examinations will be prepared, safeguarded, administered and revised to test all of the skills needed in the practice area.

Although not required in many other professions, periodic reexamination might be included in a regulatory system for nonlawyers. Reexamination can help to avoid the competency problems that are sometimes associated with part-time workers and to encourage the selection of relevant continuing education training of high quality.